

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:LM:HMT:CLE:POSTF-149567-01  
CAFisher

date: MAY - 6 1977

to: [REDACTED], Team Coordinator  
LM:FS:[REDACTED] Independence, Ohio

from: Associate Area Counsel, LM:HMT, Cleveland, Ohio

subject:

[REDACTED]  
now known as [REDACTED]  
Form 872 for Tax Years [REDACTED], [REDACTED], and [REDACTED]

This responds to your recent request for advice. This advice is provided pursuant to the 10-Day Post Review procedures of CCMD (35)3(19)4(4), as it involves well-settled principles of law. Accordingly, a copy of this memorandum has also been provided to the Office of Chief Counsel for their review and comment. We will provide their response to you as soon as it is received. This memorandum should not be cited as precedent.

Issue

How should the proposed Form 872 be completed so that it properly reflects the recent reorganization of the former [REDACTED] group.

Conclusion

Given that no agent was designated either by [REDACTED] prior to it going out of existence, or subsequent thereto by the remaining members of its consolidated group, we recommend that you obtain a revised Form 872 from [REDACTED], using the following language for the caption:

[REDACTED] (EIN  
xx-xxxxxxx) formerly known as [REDACTED]  
[REDACTED], (EIN xx-xxxxxxx) as successor to [REDACTED]  
[REDACTED] (EIN [REDACTED]) and as  
alternative agent under Temp. Reg. Sec. 1.1502-77T for  
the members of the [REDACTED]  
[REDACTED] consolidated group\*

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The following footnote should be placed at the bottom of the page:

\*This is with respect to the consolidated federal income tax liability of the [REDACTED] consolidated group for the group's taxable years ending December 31, [REDACTED], December 31, [REDACTED] and December 31, [REDACTED].

The signature block on the revised Form 872 should read as follows:

[Name of Officer]  
[Title of Officer]  
[REDACTED]

#### Facts

The Service received a Form 872 for tax years [REDACTED], [REDACTED], and [REDACTED] from [REDACTED], as common parent of its consolidated group which included, among others, [REDACTED]. The statute of limitations for these years is currently open through [REDACTED], by way of a prior Form 872. The Service executed the latest Form 872 on [REDACTED]. After executing this Form 872, the Service received a Treas. Reg. Sec. 1.337(d)-2T election ("Election") executed by "[REDACTED] as successor to, and on behalf of [REDACTED]." A footnote to the Election states that [REDACTED] was the survivor of a statutory merger between [REDACTED] and [REDACTED], which was carried out on [REDACTED]. The Team Coordinator was not aware of the merger prior to receipt of this Election. The Team Coordinator, recognizing that the caption of the Form 872 was inaccurate at the time of its execution by the Service on [REDACTED], submitted this matter for advice.

Prior to the merger, [REDACTED] was wholly-owned by [REDACTED], a [REDACTED] company. [REDACTED] and [REDACTED] were both incorporated under Delaware law. [REDACTED] was a wholly-owned subsidiary of [REDACTED].

The Merger Agreement between [REDACTED] and [REDACTED] confirms that [REDACTED] was to be merged out of existence and [REDACTED] was to be the survivor. The Merger Agreement also provides that: 1) each share of [REDACTED] common stock outstanding would be converted into a single share of [REDACTED]; and 2) each share of [REDACTED] Series A Cumulative Convertible Preferred stock is converted into a single

share of [REDACTED] Series A Cumulative Convertible Preferred stock. Thus, [REDACTED], which owned all of [REDACTED] Consolidated prior to the merger, owned [REDACTED]% of [REDACTED] immediately after the merger.

The Certificate of Merger filed with the state of Delaware, provides that [REDACTED], as the survivor of the merger, would change its name to "[REDACTED]."

#### Analysis

The common parent of a consolidated group is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. This is the rule whether or not a consolidated return is made in a subsequent year, and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time. Treas. Reg. Sec. 1.1502-77(a).

If the common parent of a consolidated group contemplates dissolution or if its existence is about to terminate, it must notify the district director with whom the consolidated return is filed of such fact and designate another member as agent to act in its place. Treas. Reg. Sec. 1.1502-77(d). The existence of a corporation is deemed to terminate if it ceases to exist under applicable law. Prop. Reg. Sec. 1.1502-77(e)(1)(i). Exam has confirmed that no Treas. Reg. Sec. 1.1502-77(d) designations were filed by either [REDACTED] prior to termination of its existence nor since then by the remaining members of the group.

Treasury Regulation Section 1.1502-77T(a)(4) identifies four "alternative" agents which can receive notices of deficiency or execute waivers of the statute of limitations on behalf of the group, if the common parent of the group ceases to be the parent, whether or not the group remains in existence<sup>1</sup>. The four possible alternative agents provided under this regulation are:

- (i) The common parent of the group for all or any part of the year to which the notice or waiver applies;
- (ii) A successor to the former common parent in a transaction to which section 381(a) applies;
- (iii) The agent designated by the group under Treas.

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<sup>1</sup> Treasury Regulation Section 1.1502-77T does not give an alternative agent the authority to execute a Form 870 agreement on behalf of the group.

Reg. Sec. 1.1502-77(d); or

(iv) If the group remains in existence under Treas. Reg. Sec. 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

See Treas. Reg. Sec. 1.1502-77T(a)(4).

The facts outlined above establish that [REDACTED] (now known as [REDACTED]) satisfied the two requirements of alternative (iv). First, the consolidated group remained in existence following the merger by way of Treas. Reg. Sec. 1.1502-75(d)(2)(ii), which provides:

Transfer of assets to subsidiary. The group shall be considered as remaining in existence notwithstanding that the common parent is no longer in existence if the members of the affiliated group succeed to and become the owners of substantially all of the assets of such former parent and there remains one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation and which was a member of the group prior to the date such former parent ceases to exist. For purposes of applying paragraph (f)(2)(i) of §1.1502-1 to separate return years ending on or before the date on which the former parent ceases to exist, such former parent, and not the new common parent, shall be considered to be the corporation described in such paragraph.

(emphasis supplied). Based upon the facts provided, the merger satisfied the requirements of Treas. Reg. Sec. 1.1502-75(d)(2)(ii). Second, [REDACTED] was part of the group at the time of merger and as discussed below, will be the common parent at the time the waiver will be executed (but having changed its identity to [REDACTED] tax free pursuant to section 368(a)(1)(F)). [REDACTED], satisfied both requirements of alternative (iv), and thus qualifies as the alternative agent to execute a Form 872 for tax years [REDACTED], [REDACTED], and [REDACTED].

It may be that [REDACTED] (now [REDACTED]) as successor to [REDACTED], also qualifies as an alternative agent of the group under alternative (ii)<sup>2</sup>. Alternative (ii)

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<sup>2</sup> The first alternative is not applicable - the common parent for the years to the waiver applies is [REDACTED].

requires [REDACTED] to be the successor to [REDACTED] in a transaction to which section 381(a) applies. Section 381(a) applies to: i) an acquisition of assets of a corporation by another corporation in a distribution to such other corporation to which section 332 (relating to liquidations of subsidiaries) applies; or ii) a transfer to which section 361 (relating to nonrecognition of gain or loss to corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraphs (A), (C), (D), (F), or (G) of section 368(a)(1).

The documents provided to us suggest, but do not explicitly state, that the [REDACTED] merger was tax free under section 368(a)(1)(A). However, given that we have concluded that [REDACTED] (now [REDACTED]) satisfies the requirements of alternative (iv), it is not necessary to express an opinion on whether it also satisfies the requirements of alternative (ii).

Finally, the change of name from [REDACTED] to [REDACTED] following the merger does not have an adverse impact on the renamed entity's ([REDACTED]) status as an alternative agent. A name change is a change in identity, which is accomplished tax-free by authority of section 368(a)(1)(F). Thus, given that [REDACTED] qualifies as an alternative agent by way of alternative (iv), [REDACTED] can rely on the principles of alternative (ii) outlined above, to claim alternative agent status.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views. Also, if you have any questions, please feel free to contact the undersigned at (216) 522-3380, ext. 3106.

RICHARD S. BLOOM  
Associate Area Counsel  
(Large and Mid-Size Business)

By: \_\_\_\_\_  
CHRISTOPHER A. FISHER  
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which is of course out of existence. Exam is unaware of any Treas. Reg. Sec. 1.1502-77(d) designation having been filed with respect to the group, so it appears that the third alternative is also not applicable.